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In the Supreme Court of the United States

OCTOBER TERM, 1951

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SUPREME COURT, U.S.

UNITED STATES, PETITIONER

v.

JOHN STUART KELLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 209

UNITED STATES, PETITIONER

v.

JOHN STUART KELLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on May 1, 1951.

OPINIONS BELOW

The opinion of the Court of Claims (R. 27-37) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1951 (R. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

In May 1943, a Presidential directive declared the wartime need for maximum output in all Government activities and directed that days normally observed by federal employees as holidays should be considered as regular work days for the duration of World War II. Federal per annum employees worked on these days throughout the war period without any additional compensation.

The question presented is whether the court below erred in construing the applicable wage agreement and federal pay statutes so as to allow federal per diem and per hour employees in the Government Printing Office two and one-half times their daily rate of pay for each holiday worked during the war period.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The 1924 wage agreement between the Public Printer and journeymen printers provides in pertinent part (R. 7):

> *Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law * * *.

2. When this agreement was negotiated, the Act of January 12, 1895 (28 Stat. 601, 607, Sec. 46, 44 U. S. C., 1934 ed., 44) made the following provision for holiday gratuity pay:

> The employees of the Government Printing Office shall be allowed the following legal holidays with pay, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, Inauguration Day, Memorial Day, Labor's Holiday, and such day as may be designated by the President of the United States as a day of public fast or thanksgiving.

3. On June 29, 1938, a Congressional resolution making the following provision for holiday gratuity pay took effect (52 Stat. 1246, 5 U.S.C. 86a):

> That hereafter whenever regular employees of the Federal Government whose compensation is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

STATEMENT

This action was instituted by a petition filed in the Court of Claims by respondent Kelly and 613 other employees of the Government Printing Office to recover compensation for work performed

by them on certain holidays during World War II (R. 1-3, 27). For this work, they claimed compensation amounting to two and one-half times their regular daily rate of pay (R. 35). The parties stipulated that the claim of respondent Kelly should serve as a test case for the determination of the other 613 claims (R. 27).

The genesis of these claims, though not disclosed in the transcript, is readily apparent from the official records concerning the wartime policy and practice of requiring all federal employees to work on holidays regularly observed during peacetime. On May 12, 1943, a Presidential Directive addressed to the heads of the executive departments and agencies declared that:

> The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should with the exception of Christmas, be considered as regular work days for the duration of the war.[1]

On December 17, 1943, this Directive was reaffirmed, the President's Administrative Assistant noting:

> This policy is consistent with the attitude of the Government toward maintenance of

[1] See Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government, compiled by the U. S. Civil Service Commission, March 1945, p. 94.

full production in war industry on Holidays other than Christmas.

The President has reaffirmed his desire previously expressed on this matter.

There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.

Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.

With respect to forthcoming holidays other than Christmas you are advised that the President expects them to be observed as regular full working days.[2]

Respondent Kelly was regularly employed by the Government Printing Office in Washington as a journeyman printer from September, 1943 through February, 1945 (R. 1). Throughout this

[2] This quotation is from the Special Findings of Fact of the Court of Claims in *Di Benedetto* v. *United States*, 108 C. Cls. 18, 21-22, certiorari denied, 332 U. S. 763.

wartime period, when the following ten holidays were treated as regular workdays for the Government service generally, Kelly was also required to work (R. 7):

September 6, 1943	Labor Day
November 11, 1943	Armistice Day
November 25, 1943	Thanksgiving Day
February 22, 1944	Washington's Birthday
May 30, 1944	Memorial Day
July 4, 1944	Fourth of July
September 4, 1944	Labor Day
November 23, 1944	Thanksgiving Day
January 1, 1945	New Year's Day
February 22, 1945	Washington's Birthday

For work on these days, Kelly, who was on the night shift, received only his regular rate of pay, including the night differential (R. 7).[3]

During this period, Kelly's compensation was fixed by a wage agreement negotiated by the Public Printer and a committee of employees representing the journeymen printers of the Government Printing Office (R. 6).[4] The agreement at all

[3] On holidays falling between September 6, 1943, and July 4, 1944, both dates inclusive, the day rate for work of the type performed by Kelly was $1.38 an hour, and the night rate was $1.584. Kelly was paid the latter rate for all hours of holiday work during this period. On the listed holidays subsequent to July 4, 1944, the day rate for work of the type performed by Kelly was $1.52 an hour, and the night rate was $1.75 an hour. On the holidays during this period Kelly was likewise paid the night rate. (R. 7-8).

[4] The agreement originally became effective on October 27, 1924 (R. 6). It was entered into under the Act of June 7, 1924 (43 Stat. 658, 44 U. S. C. 40) and was approved by the Joint Committee on Printing under that Act (R. 6).

times here material contained the above-quoted provision authorizing payment for holiday work at the day rate plus 50 percent "[plus] gratuity pay for the holiday as provided by law." (*Supra*, p. 2; R. 7).

On April 23, 1948, Kelly submitted a claim to the Acting Public Printer requesting that he be allowed additional compensation equal to one and one-half times his day rate for work performed by him on several of the holidays listed above (R. 3). This claim was forwarded to and disallowed by the Comptroller General on March 28, 1949 (R. 4-5). Kelly then brought suit in the court below, seeking recovery of pay equal to one and one-half times the day rate, in addition to the pay already received by him at the night rate, for all hours worked on the listed holidays.[5]

The Court of Claims held that the 1938 Resolution (*supra*, p. 3), which authorizes payment of holiday gratuity pay only for those holidays on which an employee is prevented from working, "did not deny to the plaintiff Kelly his right to holiday pay in addition to the pay earned by him when he worked on holidays" (R. 31). Since he had already received his full regular pay,[6] the court accordingly entered judgment for $172.32, an amount equal to one and one-half times the day

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[5] This suit was actually brought by Kelly and 613 other plaintiffs employed at the Government Printing Office. See *supra*, p. 3.

[6] See note 3, *supra*, p. 6.

rate for the ten holidays on which he worked (R. 37). Judge Whitaker, in a dissenting opinion in which Chief Judge Jones concurred, urged that Kelly should not be entitled to two and one-half times his regular pay for work done on the holidays but only to the day rate plus 50 percent. Judge Whitaker reasoned that the wage agreement (*supra*, p. 2) allowed employees who worked on holidays to be paid the day rate plus 50 percent in addition to any holiday gratuity pay provided by law; that subsequent to the 1938 Resolution the law provided for holiday gratuity pay only when an employee is "relieved or prevented" from working on a holiday; and that there was no provision in the 1938 Resolution which authorized gratuity pay for a holiday on which an employee did work (R. 36).

REASONS FOR GRANTING THE WRIT

The Court of Claims has held that Government Printing Office employees are entitled to two and one-half times their regular rate of pay[7] for holiday work performed by them during World War II when, pursuant to Presidential orders issued to achieve maximum wartime output, holidays generally were not observed in the federal service and per annum employees received no additional compensation for working. The court below reached

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[7] Under the decision of the court below, an employee is entitled to 2½ times his regular rate of pay if his regular rate is the day rate. If, like respondent Kelly, the regular rate is the night rate, he is entitled to the regular rate plus 1½ times the day rate, totalling an amount in excess of 2½ times the day rate.

that conclusion by construing the 1938 Resolution so as to allow gratuity pay [8] to per diem employees who did work on such holidays, even though the gratuity benefits of the Resolution are expressly limited to those employees who are *prevented* from working on holidays. We submit that that holding not only ignores the express language of the Resolution but also disregards its plain purpose and consistent administrative interpretation. Moreover, in view of the huge number of present and potential claims, the decision below, if allowed to stand, will impose a heavy financial, litigation, and administrative burden upon the Government. In view of the manifest importance of this decision and the substantial doubts as to its correctness, we submit that this case is appropriate for review here.

1. *The 1938 Resolution prohibits gratuity pay for holidays on which an employee works.* (a) *The express terms of the Resolution.* The Resolution states clearly the condition under which holiday gratuity pay is authorized. It provides for such payment only where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." *Supra*, p. 3. If the holiday prevents him from working, he gets gratuity pay under the Resolution; if it does not prevent him from working, he is not entitled to holiday

[8] Gratuity pay allowed for a holiday by the 1938 Resolution is equal to the employee's ordinary daily pay. See *supra*, p. 3.

pay. If he works on a holiday, it is obvious that he has not been prevented from working because of the holiday and is therefore not entitled to any gratuity pay under the 1938 Resolution.

The Resolution is clear and unambiguous and "must be taken to mean just what it says" (R. 35). Since Kelly was not prevented or relieved from working on the holidays involved here, but, on the contrary, did work on those days, he is not entitled to the gratuity pay provided by the 1938 Resolution. It is true that under the wage agreement, he was entitled to the day rate plus 50 percent for holiday work in addition to any gratuity pay provided by law. But, after the 1938 Resolution became effective, there was no gratuity pay provided by law for employees who actually worked on holidays. Kelly was at the most, therefore, entitled to the day rate plus 50 percent for any holiday on which he worked.[9]

(b) *The purpose of the Resolution.* The purpose and background of the 1938 Resolution confirm the need for limiting gratuity pay to those holidays on which an employee does not work. A predominant characteristic of pay legislation for Government workers has been to avoid discrimina-

[9] In the court below the Government contended that Section 23 of the Act of March 28, 1934 (48 Stat. 522, 5 U.S.C. 673c) rendered inoperative the provision of the 1924 wage agreement requiring payment of more than straight time rates for work on a holiday which fell within the regular 40 hour workweek. *Supra*, p. 2. The majority and dissenting opinions in the decision below rejected that contention (R. 34, 36) and it is not raised here.

tion between groups of Federal employees performing similar services, frequently under identical conditions. As early as 1880, the preferential treatment then accorded per annum employees with respect to holiday pay was recognized by Congress. Per annum employees, whose salaries are traditionally regarded as payment for every calendar day in the year (whether a workday or nonworkday), have always received their regular pay each period, regardless of any holidays on which they are excused from working. Per diem and hourly employees, on the other hand, were not paid for holidays on which they did not work.

An 1880 Resolution eliminated this inequality and prevented holidays from reducing the amount of the regular pay checks of Government Printing Office per diem employees. The Resolution allowed these employees specified "legal holidays with pay" and provided "that the said employees shall be paid for these holidays only when the employees of the other government departments shall be so paid." Joint Resolution of April 16, 1880 (21 Stat. 304). Five years later, all per diem employees of the Government were also allowed legal holidays with the "same pay as on other days." Joint Resolution of January 6, 1885 (23 Stat. 516, 5 U.S.C. 86). And, in 1895, a Resolution applicable only to Government Printing Office employees allowed them eight specified "legal holidays with pay." 28 Stat. 607, Sec. 46, 44 U.S.C. 44.

The purpose of these statutes, as has been noted, was to place per diem employees on a par with per annum employees. But the broad language of the resolutions went beyond that purpose and was interpreted so as to accord per diem employees preferential treatment over per annum employees in two major respects: First, per diem employees were allowed a day's gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a nonworkday) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Secondly, if they worked on a holiday, they received a day's gratuity pay in addition to their regular rate of pay for that day. 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187. Per annum employees, holding comparable positions, received neither of these benefits. A day's pay was not added to their wages where a holiday occurred on a nonworkday. Nor did they receive any extra gratuity pay for a holiday on which they worked.

This situation was brought before Congress in its consideration of H. J. Res. 551, 75th Congress, 3rd sess., which became the 1938 Resolution. It is true that the sole original purpose of H. J. Res. 551 was to make per diem employees eligible for gratuity pay for certain additional holidays on which they did not work and on which regular employees were excused from work by Executive Order. 83

Cong. Rec. 9466.[10] But a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the Report of the House Committee on the Civil Service, which recommended passage of H. J. Res. 551, shows that Congressional attention was also drawn to the two preferential benefits accorded per diem employees in interpreting the earlier Resolutions. The letter pointed out that

> * * * even when any of such holidays falls on a nonworkday (such as a Saturday), such employees [*i.e.* per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and that per diem employees received

> double compensation for the [holi]day if work is performed thereon. [H. Rep. No. 2683, 75th Cong., 3d sess., p. 5.]

Since the language of the Resolution as introduced was not broad enough to eliminate this preferential treatment, a substitute measure was adopted by the House Civil Service Committee. This substitute measure was enacted as the 1938

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[10] The Comptroller General had ruled that per diem employees were entitled to holiday pay only for the holidays specified in the existing statutes (*e.g.*, the 1895 Resolution, *supra*, pp. 2-3, 11), and could not receive such pay for additional holidays granted by the President, *e.g.*, December 24, 1937. See R. 28-29. H. J. Res. 551 was thereafter introduced and provided, in its original form, only for the payment of compensation to per diem employees who did not work on December 24, 1937. H. Rep. No. 2683, 75th Cong., 3d sess., p. 1.

Resolution and wiped out both preferential benefits by prohibiting gratuity pay for a holiday except where the per diem employee was "relieved or prevented from working solely because of the occurrence" of the holiday. *Supra,* p. 3. Thus, if the holiday on which the per diem employee did not work fell on a Sunday (a nonworkday), he was not to receive any gratuity pay for that holiday because it was not the occurrence of the holiday which made Sunday a nonworkday for him. Similarly, if he worked on the holiday, he was entitled to his regular rate of pay but not to any gratuity pay in addition because the holiday did not prevent him from working. To make certain that preferential benefits would no longer be available to per diem employees, the 1938 Resolution expressly repealed the earlier inconsistent Resolutions under which these benefits had been allowed by administrative interpretation. 52 Stat. 1247. By eliminating these preferential benefits, the 1938 Resolution, as noted in the dissenting opinion below, "carried out the intent of the original resolution and made it plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday" (R. 36).

(c) *Consistent administrative construction.* The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay may not be permitted for those holidays on which an employee actually worked. These rulings, relying

on the plain terms of the Resolution, show that, if any employee worked on a holiday, he obviously was not prevented from working because of the holiday and was, therefore, ineligible for gratuity pay. The earliest of these rulings were handed down within a few weeks after the 1938 Resolution took effect. 18 Comp. Gen. 10; 18 Comp. Gen. 186; 18 Comp. Gen. 191.

Since that time, the General Accounting Office has consistently adhered to this natural interpretation of the 1938 Resolution. Such a consistent administrative construction is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Company*, 316 U.S. 209, 214; *United States* v. *Jackson*, 280 U.S. 183, 193. Certainly, in view of the express language and purpose of the 1938 Resolution, there is at the very least a reasonable basis for the consistent construction accorded the Resolution by the Comptroller General. Since that construction was not clearly wrong, the Court of Claims erred in setting it aside.

2. *The wartime policy of nonobservance of holidays supports denial of gratuity pay.* In normal times there is ample justification for paying an employee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular weekday. A holiday is a day for religious, patriotic, or recreational pur-

suits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those federal employees who are required to work when other federal employees are excused from work and allowed to enjoy an uninterrupted holiday without any loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the maximum output needed for waging a successful war. The 1943 Presidential Directives, declaring this need, required all civilian government employees to work on all holidays throughout the war with the exception of Christmas. *Supra,* pp. 4-5. The normal peacetime holidays were thus converted into regular workdays and employees generally were required to work on those days "without additional compensation" (Presidential Directive, December 17, 1943, *supra,* p. 5).

This policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when holidays are regular workdays) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day, but before VJ Day,

provided that its provision for premium pay for holiday work should not take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U.S.C. 922. Postponement of the effective date of the premium pay provision was necessary because of express Congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. 726, 79th Cong., 1st sess., p. 13.[11] Since the holidays involved in the instant litigation were regular wartime workdays, it is apparent that the decision below allowing premium pay conflicts with well-established policy allowing such pay only for peacetime holidays in fact. Cf. *Di Benedetto* v. *United States*, 108 C. Cls. 18, certiorari denied, 332 U.S. 763. In doing so, the court below has placed per diem employees in a superior status expressly denied to per annum employees by consistent legislative and administrative policy.

3. *The decision below is of substantial importance.* If the decision below is allowed to stand, it will impose a heavy financial, administrative, and litigation burden upon the United States. The instant case itself involves 614 separate claims for extra pay for holiday work. The General Accounting Office has also advised that in the two and one-half month period follow-

[11] This Report accompanied H. R. 3393, which became the Federal Employees' Pay Act of 1945.

ing the date of the decision of the court below, 1807 additional claims were filed for extra pay for holiday work. Moreover, in view of the fact that holidays in wartime were regular workdays for all employees, the implications of the decision below may extend not only to all Government Printing Office employees, but to all employees of the Government whose compensation is fixed at a rate per day or per hour or on a piecework basis.[12]

CONCLUSION

For the above reasons, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1951.

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[12] Information obtained from the General Accounting Office reveals that during 1943 alone there were 695,000 "ungraded" employees in the War Department, the majority of whom were paid on a per diem, per hour or piece-work basis. That Office has also advised that the peak employment figure for the same class of employees in the Navy Department reached 500,000 in 1945. Recovery by these employees on holiday pay claims in the Court of Claims would generally be barred by the six-year statute of limitations applicable in that court. But it is significant that the claims may be cognizable in the General Accounting Office because of the ten-year limitation period there applicable. See Act of October 9, 1940, 54 Stat. 1061.

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